DATE: October 21, 1998

CASE NO.: 98-STA-00009
98-STA-00011

In the Matters of

Daniel S. Somerson

and

Gary C. Buhnerkemper
Complainants

v.

Yellow Freight System, Inc.
Respondent

Appearances:

Daniel S. Somerson, *pro se and on behalf of Mr. Buhnerkemper*

Michael C. Towers, Esq.
Anderson B. Scott, Esq.
On behalf of Respondent

Ainsworth H. Brown
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises pursuant to the Surface Transportation Act of 1982 (hereinafter the "STAA") 49 U.S.C. §31105, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. These provisions protect employees against discrimination or discipline for undertaking certain protected activities related to commercial motor vehicle safety. The Secretary of Labor (hereinafter the "Secretary") is empowered to investigate and determine "whistleblower" complaints filed by such employees, pursuant to §31105(b)(2)(A) - (C).

Complainants filed a complaint for this matter with the Department of Labor (hereinafter "Department") on October 9, 1996. Pursuant to §31105(b)(2)(A),the Department conducted an investigation into Complainants' allegations, which closed on December 11, 1997. Based on the investigation, their assertions and the Act, the Secretary dismissed this complaint on January 20,

1998. Complainants appealed the Secretary's findings by letter dated February 3, 1998, and the matter was forwarded to this Office for my consideration.

Upon timely notification of the parties, a hearing was held before me in Jacksonville, Florida on April 6, 7 and 8, 1998, at which testimony was presented and exhibits were admitted into the record. Complainants' closing argument was subsequently received on April 29, 1998 and Respondent submitted its argument on April 27, 1998.

In his complaint to the Secretary, Complainant Somerson contended that Respondent denied him full time, regular employee status, twice sabotaged his assigned truck and denied him a transfer to his preferred terminal because he previously filed a complaint against Respondent with the Department. Respondent asserts that these employment decisions were based upon, and wholly motivated by, proper considerations, and were not prompted by illegal discriminatory motives. It further denies having sabotaged Mr. Somerson's truck. Additionally, Mr. Buhnerkemper alleged before the Secretary that Respondent did not hire him as a full-time, regular driver because he had previously filed a complaint under the STAA.

Moreover, in its brief, Respondent moved for dismissal of this matter pursuant to 29 C.F.R. §18.36, which requires that "[a]ll persons appearing in proceedings before an administrative law judge are expected to act with integrity, and in an ethical manner" and subjects parties that do otherwise to exclusion from the proceedings. *Respondent's Brief* at 16 - 17. Respondent's motion is denied in the first instance because neither §18.36(a) nor (b) provide for dismissal of the complaint as a remedy or punitive measure. Moreover, Complainants' representation did not warrant the extreme measure requested by Respondent.[1] Consequently, its motion to dismiss pursuant to 29 C.F.R. §18.36 is denied.

I. Applicable Law

The STAA provides in pertinent part:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--

---

[1] At the hearing Mr. Somerson displayed mercurial mood swings, from extreme anger and agitation, to weeping during his questioning of Mrs. Buhnerkemper. Absent from his demeanor was any reasonable attempt to maintain any civility toward anyone who did not readily agree with what he had to say. Marginally, he was able to cooperate with the inquiry into his complaint and that of his associate. With considerable forbearance in response to his selective cooperation, I was determined to provide him and his fellow Complainant as fair a process as could be achieved under the circumstances. The record as made may be reviewed by others as to coherence, fairness and adequacy.

> (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> (B) the employee refused to operate a vehicle because--
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C.A. §31105(a).

Additionally, 49 C.F.R. §392.3 provides that

> No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.

Employees in the transportation industry are afforded this "whistleblower" protection because they are often best situated to discern safety violations, but, because they may be threatened with discharge for directing attention to these concerns, they require "express protection against retaliation for reporting these violations." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

In order for a complainant to prevail under the STAA through reliance upon circumstantial evidence, he must first establish a prima facie case of retaliatory action by the respondent, *to wit*: that (1) he was engaged in protected activity, (2) the respondent was aware of the conduct, and (3) the respondent took an adverse action against him. *Clean Harbors Environmental Services, Inc., v. Herman*, __ F.3d __, No. 97-2083, 1998 WL 293060 (1st Cir. June 10, 1998)*; Byrd v. Consolidated Motor Freight*, 97-STA-9 (ARB May 5, 1998). The complainant must also offer evidence sufficient to raise the inference that the adverse action was likely caused or contributed to by the protected activity. *Id.*; 42 U.S.C.A. §5851 (b)(3)(C). If the complainant establishes this prima facie case, the respondent must produce evidence that the alleged adverse action was motivated by legitimate, non-discriminatory reasons. The respondent's burden is one of production only. *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981).

In the event that the respondent is successful in articulating the above, the complainant must then show that Respondent's proffered business reasons are mere pretext for discrimination.

If an adverse action was undertaken for both discriminatory and nondiscriminatory reasons (i.e., for "mixed motives"), the respondent must show by a preponderance of the evidence that it would have so acted absent the complainant's protected activity. *Clean Harbors Environmental Services, supra*. At all times during the above analysis, the burden of showing by a preponderance of the evidence that the respondent was motivated by illegal animus rests with the complainant. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Additionally, a *pro se* complainant's burden to so prove does not differ in this regard from that of a complainant who is represented by counsel. *Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec'y Oct. 10, 1991).

II. Testimony and Documentary Evidence

The following evidence has been admitted for my consideration:

Testimony

Complainant Somerson testified at the hearing in April. (TR 37 - 236, 425 - 430). He has performed truck driving work since approximately 1980. (TR 40). When he applied for a driving position with Respondent, he stated that he was immediately available for work as a "linehaul doubles driver," his salary expectations were open, he sought casual, part- or full-time work at any hour, for any day, and he was willing to travel and relocate. (TR 243). He began working for Respondent as a casual tractor trailer driver (i.e., one who works weekends, peak periods, etc.) in April or May 1993. (TR 38, 44, 49, 237). In January 1995 he became a full time casual driver. (TR 44, 46 - 47). He then experienced fatigue because his irregular work hours interfered with his sleep schedule. (TR 47 - 48, 284 - 285). Mr. Somerson stated that when he informed his supervisor, Linehaul Operations Manager Charles Chadwick, of his fatigue, he was advised to work in another field. (TR 48 - 49, 242). Then, after asking for Mr. Somerson's preferred workdays, Mr. Chadwick informed Mr. Somerson that he would work Thursday through Sunday. (TR 49 - 50, 284 - 285, 302).

According to Mr. Somerson, he was told that the Teamsters union objected to this perceived schedule agreement. (TR 53, 57 - 58). Other employees and his shop steward expressed animosity toward him for his perceived "sweetheart" schedule as well. (TR 58 - 59). Moreover, he would be targeted for a seven-days per week, on-call status by Respondent as a result. (TR 54). Because he would not be properly rested under such conditions, Mr. Somerson contends, he filed a complaint. (TR 54).

In January 1995 John Olover became the Linehaul Operations Manager and Mr. Chadwick became the General Operations Manager. (TR 285 - 286). Mr. Somerson recalled that Mr. Olover then informed Mr. Somerson that his "sweetheart" deal was over, and asked if he was available seven days per week as a casual driver. (TR 59 - 60, 286). Mr. Somerson replied that he was in theory, but that he may not be sufficiently rested to operate a commercial motor vehicle if called seven days a week. Mr. Olover said that was "not an excuse" and that Mr. Somerson was "on notice," according to Mr. Somerson. (TR 59 - 60).

During the following two months, Mr. Somerson informed the dispatchers that he was not available for assignments on several occasions, due to illness, fatigue or with their approval. (TR 287). Moreover, he would never drive if he were tired, sick or if he felt he would endanger the public by doing so. (TR 293). On approximately March 6, 1995 Mr. Berg inquired whether Mr. Somerson was available for work. He replied that he was too fatigued to drive safely, and that he would not drive. (TR 60 - 62). He testified that he could not sleep and did not expect to be called. (TR 291). Mr. Somerson did not recall whether he told the dispatcher that his car broke down. (TR 298). He was on-call at the time, although he was earlier informed that he would not be called. (TR 290).

The following morning Mr. Olover informed Mr. Somerson that he "would never do something like that again," and that he should work in a different field. (TR 62, 300). Mr. Olover further stated that Complainant Somerson was to always be available, within the parameters of applicable safety regulations, and that "when your rest is up you have to be available to take a run. . ." (TR 300, 314). In response, Mr. Somerson asked whether that applied even when he was fatigued, to which Mr. Olover replied that fatigue was not an excuse, and recommended another line of work due to Mr. Somerson's history of being fatigued when called. (TR 300 - 301). According to Mr. Somerson, he stated that he was being abused, and he informed Mr. Olover that a complaint had been filed pursuant to the STAA. Mr. Olover then told Mr. Somerson that he was fired, according to Complainant. (TR 61 - 62). After a conversation with Mr. Dempsey, two hours later Mr. Olover called back and said that a misunderstanding had occurred, and that Mr. Somerson was not terminated. (TR 63). He was suspended for the day, and then his name was placed back on the board from which casuals are called when regular drivers are unavailable. (TR 64). Mr. Somerson stated that he was unaware of a workplace which required him to ask the dispatchers to take his name "off the board" when he was unable to accept a driving job, and that "there were no rules for casuals." (TR 288, 294). He also stated that Mr. Chadwick never informed him of such a rule, and Mr. Olover had, although in verbal, and not memo, form. (TR 295).

Referring to RX 3,[2] *infra,* Mr. Somerson testified that he was unable to answer Respondent's dispatch call on May 14, 1995 because he was on duty and driving for Respondent at the time, and that he not receive a call from Respondent on May 11, 1995, contrary to Respondent's assertions. (TR 65 - 66). He received a letter on May 15, 1995 which stated that he was terminated because he failed to be available on those dates. (TR 67). After filing a complaint, Mr. Somerson and Respondent reached a settlement agreement which enabled him to return to work eighteen weeks after his discharge. (TR 69 - 70).

Unattributed threats were relayed to him upon his return to work. (TR 76 - 77, 231). Additionally, a dispatcher circulated rumors that Mr. Somerson was homosexual, according to Mr. Somerson. (TR 77). While cross-examining another witness, Mr. Somerson revealed that

---

[2] The following references appear herein: "CX" for Complainants' exhibits, "RX" for Respondent's exhibits and "TR" for the hearing transcript.

James R. Collins was the source of the rumors. (TR 916 - 919; *see* RX 21, *infra*). This resulted in taunts by other drivers and more fatiguing assignments, which were "over the hours of service," from dispatchers. (TR 78 - 79). Mr. Somerson described dispatcher attitude toward him in particular as "hostile" and "abusive". (TR 185).

On February 10, 1996 Mr. Somerson was driving for Respondent when his trailer flipped over and hit the cab in which he was sitting, causing him injury. (TR 81, 417). He had performed a check of the vehicle prior to departure. (TR 82, 84). During his hospital stay Respondent's independent insurance adjuster told Mr. Somerson that the accident was not his fault; rather, it occurred because the trailer was overloaded. (TR 85). She later restated this conclusion, and concurred with Mr. Somerson that "there is this noticeable hostility," between he and Yellow Freight management. (TR 87, 417). He stated that he suspected foul play shortly after the accident, although he waited until he felt sure before declaring so in writing. (TR 322, 418 - 419). According to Mr. Somerson, a guard employee knew the accident was orchestrated to cause harm, and observed that the truck was investigated and then moved out of the dock in an unusually swift fashion. (TR 420 - 421, 424 - 425). Ultimately Respondent found Mr. Somerson was not at fault, and he returned to work. (TR 88, 90, 418). He was unaware of a determination by Respondent that the accident was not preventable. (TR 323).

Interaction with Yellow Freight personnel was "strained" upon his return, and intimations of retaliation were made. (TR 92 - 95). He received favorable and unfavorable assignments. (TR 96 - 97). Mr. Somerson was harassed about fatigue, and procedures for reporting it were not easily discerned. (TR 97). Later, on February 5, 1997, Mr. Somerson again suffered a mishap. (TR 98, 342 - 343). A pre-trip inspection had been performed, according to Mr. Somerson. (TR 99). While driving for Respondent he lost his air supply to the rear trailer, and it skidded for approximately three hundred and fifty feet. (TR 99 - 100, 349). On inspection he heard air leaking and saw that an air hose which leads to the front trailer appeared to have been sliced. (TR 101, 356). He called the dispatcher and reported that he blew an air hose, and an unaffiliated mechanic was called. (TR 102). He did not believe that the hose had been cut (and would not allow Complainant Somerson to keep it), and was skeptical of Mr. Somerson's assertion that the company had attempted to harm him. (TR 102 - 103). According to Mr. Somerson, the accident was caused and/or sanctioned by Respondent and the Teamsters Union. (TR 343 - 344).

In light of the accident, Mr. Somerson was tired when he arrived in Orlando several hours later, and he informed Mr. Berg that he required sleep. After initial reluctance, Mr. Somerson was permitted to rest. (TR 104 - 105). After the trip Mr. Buhnerkemper informed him that his brake line had been sliced as well, and, according to Mr. Somerson, they were cut at approximately the same time, and at the same terminal. (TR 106 - 107, 233 - 235). Both Complainants informed the Occupational Safety and Health Administration (OSHA) of the incidents and filed complaints. (TR 107- 108). Mr. Somerson also informed the police of the incidents on February 10, 1996 and February 5, 1997, and was told to call if something happened again. (TR 113).

Subsequently, on February 16, 1997, Mr. Somerson checked in for a driving assignment at Yellow Freight. (TR 114 - 117). After an absence of approximately ten minutes, Jack Wade, the dispatcher, gave him the requisite paperwork, and Mr. Somerson performed his pre-trip inspection. (TR 117 - 118, 385 - 386). He saw that a "pindle hook assembly" was not in a locked position, and he believed the trailer load, which contained hazardous materials, was uneven. (TR 118 - 119, 126). After informing the yard man of the discrepancies, he was told that he was overreacting, and that such things frequently occur. (TR , 386 - 387). Mr. Somerson informed the linehaul manager, Mr. Chadwick, that his truck had been tampered with, and was instructed to drive the truck to the company shop. (TR 120 - 121). Out of safety concerns, and because there was no company policy which required him to do so, according to Mr. Somerson, he refused to drive the truck to the shop, which was between one hundred and three hundred feet away. (TR 121, 396 - 398, 401 - 402). He also stated that he would not drive the truck until and unless it had been thoroughly inspected, preferably in his presence. (TR 393). He then summoned the police, and no irregularities were detected upon inspection by the arriving officer. (122 - 125). The truck was the subject of radio communication by Respondent prior to the officer's inspection, according to Mr. Somerson. (TR 123). He was then escorted from the property at his superior's request and lost pay for the day. (TR 124 - 125, 138). Although one employee considered him to be "fired," he obtained approval from Mr. Chadwick to return to the board, and he worked until the terminal closed in April 1997. (TR 403 - 404).

According to Mr. Somerson, he was not offered a regular position when Yellow Freight was hiring full-time, regular drivers in the Fall of 1996, while other casual drivers that were less senior were offered regular status. (TR 177, 335). He explained that he was informed that the chief factor for determining whether a driver would be hired as a regular was seniority. (TR 176 - 177, 335). Mr. Somerson failed to directly answer whether he knew of exceptions to the seniority preference. (TR 338). Union membership was also an important consideration. (TR 177). Mr. Somerson stated that a Mr. Cappozzoli was given regular status previously despite his less senior work history, because Respondent wished to counter Mr. Somerson's assertion that such decisions were based exclusively on seniority. (TR 178). He referred to a Messrs. Kelly, Wilson and Kennedy as having been "promoted" despite less senior status, although Mr. Somerson also stated that he did not understand the seniority roster which was publicly available. (TR 210, 334 - 336). Mr. Somerson affirmed that his complaint as to the retaliatory nature of his failure to be hired as a regular driver in October 1996 was due to his seniority to two persons that were so hired. (TR 341). He did not know whether other casual drivers, senior to him, were not hired as regular drivers as well, aside from Mr. Buhnerkemper. (TR 341 - 342).

Regular status would not have completely addressed Mr. Somerson's fatigue concerns in any case, because low-seniority regulars are essentially casuals with additional benefits, and can thus be called at random as well. (TR 180). Additionally, regulars were subject to the vagaries of dispatcher assignment, as well as union pressure to drive fatigued. (TR 181 - 182). Casual work was offered in other cities, but Mr. Somerson did not apply for it. (TR 187 - 190, RX 1).

Complainant Somerson stated that he was told by a dispatcher that Respondent also retaliated by having the dispatchers move his card on the board, so that he was called out of turn, rather than in the rotation order. (TR 112, 318 - 319, 415 - 416). Both he and Mr. Buhnerkemper were hated by the dispatchers, according to Mr. Somerson. (TR 415). He further stated that he did not know whether his card was moved every time he refused a dispatch, since he "wasn't working there at those times when they were manipulating the cards." (TR 312).

Mr. Somerson also testified that Respondent had its drivers perform a "double Orlando", which required consecutive round-trip journeys from Jacksonville to Orlando, each of which was an eleven hour drive. (TR 199 - 208). A typical shift lasted from 3:00 a.m. until 3:00 p.m., which interferes with the sleep cycle and induces fatigue. (TR 204). According to Mr. Somerson, the double Orlando run was illegal, since it could not be performed within ten hours. (TR 207 - 208). Mr. Somerson complained of the run to Chip Warren and Terry Graham. (TR 200, 205, 409).

Complainant Somerson testified that the above incidents resulted in "constant" discrimination, of which he informed the OSHA investigator, and which resulted in his failure to be hired as a regular driver in September, 1996. (TR 209). Additionally, Mr. Somerson testified that he informed Respondent of standing water conditions at the Fort Myers terminal, but his complaint was unheeded. (TR 194 - 198). He further stated that he had only one other problem - an inquiry by his superior regarding a complaint by a car driver - until he filed his complaint. (TR 50).

Mr. Somerson would not reveal the identity of his present employer out of concerns of retaliation by Yellow Freight. (TR 210 - 217). He stated that he has had one employer since August 1997. (TR 219). Additionally, he declined to state the reasons he left prior employers, despite requests by Respondent and myself that he do so. (TR 248 - 252). It was revealed that his position with White Swan Food Service, Inc. ceased because of a disagreement over the hours of service or a change in Mr. Somerson's job description, alternatively. (TR 380). Although he conveyed that he did not have dispatcher or supervisor problems with his prior seasonal work positions, he would not answer such questions at other times. (TR 251, 253 - 255).

According to Mr. Somerson, he understood that he could drive no more than ten hours per twenty-four hours (drive time), and on-duty time may not exceed fifteen hours per day (including the maximum ten hours of drive time). (TR 259 - 260). He also knew that he could not be on-duty more than seventy hours per eight days, and he was entitled to eight hours of rest after fifteen hours on duty. (TR 264, 274). He was aware that he was duty-bound to refuse work which exceed these limits, and to inform Respondent if he exceeded these hours. (TR 265). Mr. Somerson would rest due to fatigue, even when he did not exceed these hours, and he did so on the aforementioned double Orlando trip. (TR 267 - 269). He further stated that was not permitted to a block of time off ("book off") from the usual twenty four hour, seven days availability arrangement for any reason. (TR 281 - 282).

Physician advice was sought on how to deal with his Respondent-generated fatigue, according to Complainant Somerson. (TR 302 - 304). He stated that his eight hour rest period commenced immediately after dropping his load, and included travel time to the hotel and waiting for a room. (TR 304 - 305). At times he was unable to sleep due to hotel conditions. (TR 305). Additionally, Mr. Somerson denied having urinated in a rest facility that he felt was unsuitable. (TR 270 - 272).

Mr. Buhnerkemper also testified at the hearing. (TR 430 - 569). Mr. Buhnerkemper is a trained truck driver, and drove for eight years prior to working for Respondent as a casual driver, which commenced in April 1993. (TR 431, 497). He filed his complaint in October 1996, and was not called for work for approximately the next ten days. (TR 433, 447 - 448). He complained that he and Mr. Somerson were treated differently from the other casual drivers, by being called out of order on the board and by being given longer runs. (TR 436 - 437, 439). He had never seen the dispatchers manipulate the cards, but was informed by Ken Bagwell, the senior dispatcher, that they did so. (TR 440). On one occasion, Mr. Buhnerkemper requested that the board reflect his availability, after he was off the board for some time due to illness. (TR 438 - 440). Two hours later he was called for duty, even though he expected to be called later since it was a slow day for the company, and there were twenty drivers preceding him on the board. (TR 438 - 440). He recalled no other such instances. (TR 440). Moreover, he and Mr. Somerson received more "double Orlando runs" than others, which he contended required more driving hours than permitted by law and which was fatiguing. (TR 441). The assignments to Miami were excessively fatiguing as well, and his eight hours of resting time was diminished due to travel time to the hotel and room unavailability, at times. (TR 442, 478 - 479). Mr. Buhnerkemper also complained of being "treated like second class citizens." (TR 443). He worked for Respondent until it closed the Jacksonville linehaul terminal in April 1997. (TR 449). He then received unemployment benefits until August 1997, when he attained his present position as a full-time truck driver (TR 449 - 451).

According to Mr. Buhnerkemper, Respondent was responsible for severing his brake line in retaliation for his complaints. (TR 472). When the brake system is functioning properly, blue (the service line) or red (the emergency line) flexible tubes, which run air from a compressor in the cab, maintain air pressure in the brake system, preventing the brakes from being applied unless the operator releases air from the system. (TR 522, 526, 530). While driving to Labelle Mr. Buhnerkemper's emergency line leaked, resulting in braking difficulty, since he "lost all the air in the truck" and "couldn't build it up no more." (TR 472 - 473, 517 - 518). Because air was leaking from the brake system, the brakes were applied, i.e. were locked. (TR 521 - 522, 526). The breech occurred on the dolly line, which appeared to have been cut, based on the appearance of the hose and other attachments. (TR 473, 475 - 476, 518 - 519). After pulling off the road, he called Respondent to report the problem, and did not state the line had been cut, despite its "suspicious" appearance. (TR 522 - 523). A mechanic that Respondent summoned replaced the breeched portion, and made no comment when Mr. Buhnerkemper noted the clean appearance of the hole. (TR 524 - 525). Prior to his trips, he always performed a pre-trip inspection, which

included the air lines, and found leaking air lines on occasion. (TR 519 - 521). Moreover, in his experience pindle hooks could open on their own accord on occasion. (TR 528 - 529).

When mechanical problems were detected on his truck, he believed the proper procedure was to proceed to the shop and report the problem to the mechanical department. (TR 511 - 512, 529). If it was sufficiently serious, he would subsequently inform the dispatcher as well. (TR 511 - 512). He would not drive a truck to the shop if he believed it unsafe, out of fear of discharge, and he would exercise extra caution with a load of hazardous materials. (TR 556 - 557, 560).

Mr. Buhnerkemper also testified that in April 1996 he was asked to drive over the permissible hours of service - after having driven eight hours, Respondent asked him to drive an additional 2.5 hours - and he complained to OSHA about the incident. (TR 443 - 444). He was then taken off the board and did not work for the following week. (TR 444). He promptly called to ask why he was not called, and was told he was off the board, but was not told the reason. (TR 445). Subsequently he withdrew the complaint on the advice of Mr. Russell. (TR 446 - 447).

Additionally, Mr. Buhnerkemper asserted that Jack Wade assigned him a driving run through a hurricane after he filed his complaint in October 1996. (TR 459). Further, he was assigned to drive to the flooded Fort Myers terminal in retaliation for his complaint. (TR 461).

According to Mr. Buhnerkemper, he was twice considered for, and denied, regular driver status. (TR 451). The first instance was in August 1996, when he reapplied after having achieved full-time casual status. (TR 451 - 452). Then, in approximately October 1996, Mr. Buhnerkemper was informed by Mr. Bagwell that Mr. Olover had his application for regular status, but did not know what happened to it. (TR 452 - 453). Mr. Chadwick previously informed Mr. Buhnerkemper that seniority determined regular status. (TR 455).

Mr. Buhnerkemper was aware that he could not drive more than ten hours per day, nor more than seventy hours per eight days, and initially he worked for Respondent the three days he did not work for another company during the week. (TR 500 - 501, 535). He also knew the position required full-time availability by January 1995, and stated he was so available before that policy change. (TR 501 - 502). Moreover, Mr. Buhnerkemper stated that he fell asleep “probably dozens” of times while driving due to fatigue, but he was afraid to inform the company out of disciplinary fears. (TR 466). His fatigue resulted in domestic disaccord. (TR 467 - 468). Generally, Respondent forced drivers to drive fatigued, according to Mr. Buhnerkemper. (TR 469). Further, Mr. Buhnerkemper stated that scheduling was more flexible under Mr. Chadwick than Mr. Olover. (TR 453 - 454). He confirmed that Mr. Somerson had a four days per week schedule, which resulted in contention among the other drivers. (TR 454 - 455).

Respondent employed approximately twenty casual drivers at any given time. (TR 503). Other drivers in this pool were not selected for the regular driver positions in the Fall of 1996, aside from Complainants. (TR 505 - 506). Mr. Buhnerkemper was unaware whether these drivers

were senior to him, whether Mr. Cappozzolli was senior to him, and whether drivers were sometime hired at the Teamster's request. (TR 506 - 508).

If Mr. Buhnerkemper became ill, was fatigued or had transportation problems he would instruct the dispatch office to take him off the board prior to being called for a dispatch, per Respondent's operating requirements. (TR 532 - 533, 554). He also stated he did so out of courtesy, and was not told he had to do so. (TR 563). Further, he supposed that if he wished to attend to personal business or take time off, he could request the dispatchers to take him off the board for a specified period. (TR 533 - 535). When asked whether it was established that company rules and regulations applied to drivers' withdrawal from the board, Mr. Buhnerkemper replied, "according to Mr. Dempsey, yes." (TR 554). Company rules were in flux at times. (TR 555, 560 - 561). He also confirmed that his signature appeared on RX 10 (see below), although he did not recall having signed the document. (TR 565 - 566).

Mr. Buhnerkemper contended that he obtained the consent of the other party prior to recording their conversations. (TR 541).

Teechee Buhnerkemper, Mr. Buhnerkemper's wife, testified as well. (TR 570). She attested to the worries and problems of the Buhnerkemper family caused by her husband's job at Yellow Freight. (TR 571). She also noted Respondent pressured Mr. Buhnerkemper and that he would not be well rested for his tasks because he would rely on the dispatchers' predictions as to the likelihood of his being assigned during a given period, which were inaccurate at times. (TR 571 - 572). Ultimately, he hoped to become a regular driver, she stated, so that his schedule and their lives would become more stable. (TR 575 - 579).

John Olover, who was Respondent's Linehaul Operations Manager in Jacksonville from January 1995 to September 1996, and who worked in the trucking industry for twenty-nine years, testified as well. (TR 874, 886, 982 - 983). His duties included overseeing the linehaul operation, freight movement and customer service. (TR 874). Company dispatchers reported to coordinators, who in turn reported to Mr. Olover. (TR 874 - 875).

According to Mr. Olover, he changed Mr. Chadwick's policy of permitting a few select drivers to be available for work on specific, limited days of the week to accommodate their other driving jobs. (TR 877 - 878). Instead, all drivers were required to be available seven days per week, twenty-four hours per day, excluding mandatory rest periods. (TR 880 - 883). Those with other jobs were advised of the change, and they conformed by leaving their other positions. (TR 880). He changed the policy because he received complaints from coordinators, drivers and the union that certain drivers were "playing the board," i.e. controlling their schedule so they could "accept dispatches on a certain day or accept dispatches whenever . . . they felt like it." (TR 878 - 879). Mr. Olover stated that the union complained because the prior system, in effect, granted certain drivers special privileges, namely, the ability to limit on-call availability. (TR 879 - 880). Regular drivers were not permitted to have a part-time schedule. (TR 879 - 880). Mr. Olover also testified that he signed the operating procedures notice at RX 16, *infra*, which were posted

on the bulletin board in the driver's break room. (TR 875, 877). All drivers had access to the board. (TR 877). A similar notice was posted by his predecessor, Mr. Chadwick, who employed the same operating procedures. (TR 876).

Mr. Olover described the driver scheduling system in essentially the same manner as Mr. Chadwick, *infra*. He clarified that a driver who returned from a delivery would indicate the next available call block that he would be available, which was the nearest call block after an eight hour rest period. Call blocks, when drivers were called for assignments, occurred every three hours - at nine, twelve, three, and six o'clock, around the clock - and a driver, when called, was required to report within two hours. (TR 882 - 885). The driver was also required to be available during the entire call block to receive an assignment, unless he calls to remove himself from the board of available drivers. (TR 885). If he was not called during that call block, he was to be available during the following block for assignment. (TR 887). The driver would incur no penalty for not answering the phone if he were called outside of his call block; however, his time card would be moved to the last position, and he would be last in the assignment rotation. (TR 888, 896). When a driver was sick or fatigued, he was obliged to inform the dispatcher or coordinator. (TR 890, 979, 997). The driver's card was then removed from the call block and placed last on the list of those for dispatchers to call, i.e., he would not be called for at least twenty-four hours. (TR 890, 980). He stated that "drivers have an option to call off any time they feel like they need to." (TR 975). No driver should drive if fatigued, according to Mr. Olover. (TR 997).

Only Mr. Somerson complained about the new policy to Mr. Olover, he stated. (TR 881). Mr. Somerson requested that Mr. Olover abide by the prior scheduling agreement with Mr. Chadwick, and Mr. Olover denied the request. (TR 881 - 882). When called for assignment, Mr. Somerson was frequently unavailable, because of fatigue or doctor's appointments. (TR 888 - 889). This raised reliability concerns in Mr. Olover. (TR 889). In January and February of an unspecified year Mr. Olover addressed Mr. Somerson's attendance with him. (TR 890). According to Mr. Olover, in March 1996 Mr. Somerson refused to accept an assignment from Respondent's dispatcher because he did not have transportation to the terminal. (TR 890, 896). Further, Mr. Olover stated that Mr. Somerson argued during the call that he could not be called outside of his call block, which was incorrect, since a driver could be called outside his call block and, if he answered the call, he was considered available for the task. (TR 896). This impression was based upon an audio tape which recorded the assignment call and a report to Mr. Olover by the dispatcher. (TR 896). Mr. Olover testified that approximately forty-five minutes later Mr. Somerson called back and related that he was fatigued. (TR 896 - 897). Mr. Olover did not believe this explanation and consequently disciplined Mr. Somerson by removing him from the assignment board. (TR 896 - 897). "Due to the nature of . . . [Mr. Somerson's] reasoning," Respondent's legal department directed Mr. Olover to replace the driver on the board, and he complied. (TR 897 - 898). He said that he then informed Mr. Somerson that he was again placed on the board on March 6 or 7, 1996, on condition that he conform with Respondent's twenty-four hours, seven days per week availability requirement, and Mr. Somerson agreed. (TR 898). On the whole, Mr. Somerson's and Mr. Buhnerkemper's driving skills were not deficient; rather, Mr. Somerson's "problem" was that he was "never available to drive." (TR 987 - 991, 993). No

efforts were undertaken by Mr. Olover to discipline or counsel either Mr. Somerson or Mr. Buhnerkemper, however. (TR 987).

Further, Mr. Olover stated that Respondent has in some instances ceased hiring casuals that have had nonpreventable accidents, and that Mr. Somerson had an accident in November 1995 in which he had to drive from the location of the accident prior to reporting it to the company because of safety concerns. (TR 919 - 920, 1007). He was not disciplined for this deviation from company policy, and Mr. Olover accepted the explanation for the deviation proffered by Mr. Somerson. (TR 921 - 922, 1007). Moreover, Respondent found his February 1996 accident was nonpreventable. (TR 922 - 923). Mr. Somerson was removed from the assignment board pending the accident investigation, pursuant to company policy, and was then reinstated. (TR 923).

Mr. Olover also related an altercation between Mr. Somerson and Jerry Huntsinger, a dispatcher. (TR 924 - 927, RX 22). Mr. Olover further stated that in September 1995 Mr. Somerson "marked his T-card fatigued in advance," anticipating that he would be fatigued 10 or 12 hours later. (TR 927 - 929, RX 23). Mr. Somerson was not disciplined, but was sent a letter by Mr. Olover addressing the incident. (RX 23, *infra*).

Additionally, Mr. Olover testified that he had three full-time positions to fill in 1996 because the number of casual assignment hours exceeded the amount specified in the National Master Freight Agreement. (TR 930). In order to do so, he received recommendations from dispatchers (since they worked directly with the drivers) and the Teamsters Union, and he reviewed the files of those recommended, particularly their driving histories (e.g. overall driving experience, accident records). (TR 930 - 932, 999 - 1000, 1002). Ability to get along with co-workers was another criteria. (TR 1002). Additionally, older drivers were sought for the positions because of their maturity. (TR 932). The Teamsters recommend those members who are good drivers and who require additional experience to qualify for their pensions, and one of those hired (Wilson) was such a driver. (TR 933 - 934). Although some experience with the company was necessary in order to assess their work, seniority was not a factor, according to Mr. Olover. (TR 931). There were approximately twenty-five casuals working for the terminal from which to choose.

Mr. Olover decided to hire Paul C. Wilson, George Kennedy and Michael W. Kelly for the full-time positions in August 1996. (TR 939, RX 23 - 25, *infra*). Messrs. Wilson and Kennedy were both recommended by the Teamsters because their prior employers went out of business, and both drivers required additional driving employment to qualify for their pensions. (TR 944 - 946). Mr. Kelly was hired because he was highly recommended by the dispatchers and his fellow employees. (TR 946 - 947). Additionally, his age (he was in his forties or fifties) was also an important factor that weighed in his favor in the hiring process. (TR 947). His general employment history was also a consideration. (TR 947). Further, those selected had between approximately thirteen and twenty-five years of driving experience, and they were not assessed point on their driving records, Mr. Olover recalled. (TR 1004). No other drivers who were in

casual status at the time of the hiring process were offered full-time status, although there were many qualified casual drivers at the time. (TR 948, 999).

Mr. Somerson would not have been a good regular driver, according to Mr. Olover, because he was "never, ever available" and "[his] attendance was bad." (TR 991, 993). His unavailability was caused by fatigue, dental appointments, doctor's appointments and car problems. (TR 994). Additionally, Mr. Somerson was disruptive in the workplace, and did not get along with Respondent's employees, according to Mr. Olover. (TR 1002 - 1003). Moreover, Mr. Olover was never informed by Mr. Somerson that he was interested in achieving regular status, and he expressed disinterest in the position. (TR 993 - 995). The aforementioned accidents were not charged to Mr. Somerson, Mr. Olover agreed. (TR 1006). Additionally, Mr. Buhnerkemper would not have been a good regular driver, although he was more available than Mr. Somerson. (TR 996).

The tape at RX 17, *infra*, was played at the hearing. After the tape was played, Mr. Somerson informed the Court, and Mr. Olover agreed, that Mr. Somerson was subsequently "counseled" on the driver availability policy. (TR 966, 969). Mr. Olover denied that he told Mr. Somerson that he would be excepted from the policy by only being called after all other drivers had been called. (TR 975 - 976). He further stated that he investigated the allegations that dispatchers manipulated the board and found they were not true. (TR 977 - 978).

Charles Chadwick, Respondent's Linehaul and General operations manager at the Jacksonville terminal, testified as well. (TR 590 - 592). He was responsible for overseeing all of Respondent's freight shipments in Florida. According to Mr. Chadwick, Mr. Somerson worked directly for him from May 1993 to January 1995 and from October 1996 to April 1997. (TR 734). Mr. Somerson requested, and was hired for, a full-time driver position. (TR 606 - 607). As such, he was expected to be always available, in accordance with the above terms, and Mr. Chadwick believed he so informed Mr. Somerson at the time he was hired. (TR 707 - 708). Soon thereafter he expressed interest in attaining regular status. (TR 607). Mr. Chadwick noted that Mr. Somerson consistently marked off, either by indicating a call block later than the next available block, or by calling the dispatchers and informing them that he could not receive an assignment. (TR 607 - 608). He stated that he addressed the issue with Mr. Somerson, essentially in the manner described by Mr. Somerson, *supra*, that is, by an agreement that he would be available for assignments on Thursdays through Sundays. (TR 608 - 609). Mr. Chadwick testified that he told Mr. Somerson that he had to be available during this period. (TR 702). The encounter left Mr. Chadwick with the impression that Mr. Somerson was not, in fact, actually interested in a regular position, since he stated he did not want a full-time job. (TR 641 - 642, 760 - 761). During this initial period (May 1993 to January 1995) Mr. Somerson was not disciplined, nor did he present any other problems, and his work performance was satisfactory. (TR 736 - 737). No complaints of tardiness were lodged against Mr. Somerson during this period. (TR 737). Mr. Buhnerkemper was a satisfactory casual driver as well, but his name, too, was forwarded by the dispatchers in their recommendations for the regular driver positions. (TR 739 - 741).

When he was informed of Complainants' sabotage allegations (described by Mr. Somerson and Mr. Buhnerkemper, above), Mr. Chadwick contacted the maintenance operator in order to conduct an investigation. (TR 637 - 638). The resulting report conveyed the damage was due to normal wear and tear. (TR 638). There was no evidence that the air lines were cut. (TR 638). Brake air line failure periodically occurred. (TR 638 - 639). Mr. Chadwick doubted the validity of Mr. Somerson's assertion of sabotage, because he was "paranoid about everybody was out to get him. You know, anything that would happen no matter how commonplace it might be he related it to the fact that . . . it was a conspiracy to try to kill him." (TR 639).

Mr. Chadwick related that in February 1997 he was informed by Mr. Somerson of suspected truck sabotage, after he observed that the pindle hook assembly was not locked down during his pre-trip inspection. (TR 654). Assemblies had been left up before, according to Mr. Chadwick, and constitute a danger when in the "up" position. (TR 654, 7763 - 764). He instructed Mr Somerson to drive the truck to the mechanical department, which was at most 350 feet away, so that the vehicle could be inspected, pursuant to company policy. (TR 653 - 655, 689 - 690). Once there, he could have his card stamped by a special clock, and he would have been paid for the time the truck was in the shop. (TR 655 - 657). Mr. Somerson refused to bring the truck to the shop, which constituted insubordination punishable by verbal warning and a note in the file, or by refusal to hire in the future. (TR 655, 658, 764). Mr. Chadwick could not say with absolute certainty that nothing was wrong with the truck, nor that an accident would absolutely not have occurred. (TR 689 - 692). He stated on tape that he felt it was outside of the realm of possibility because, in his opinion, the vehicles had not been tampered with, and because Mr. Somerson became paranoid when adverse events happened to him. (TR 692 - 693).

When operations commenced in July 1990 approximately forty regular drivers were transferred to the terminal. (TR 596). Certain regular drivers are accorded protections and privileges under their union contract, including the right to select specific assignments based on seniority ("bid runs"). (TR 596). Extra board regular drivers were assigned in seniority order, and could express a preference ("hold") for "lay downs" (i.e., deliveries requiring an overnight stay) or "turns" (round-trips on the same tour). (TR 597 - 598). If a non-preferred delivery was required and no one else was available, these drivers were compelled to accept the task. (TR 599).

Casual drivers ("casuals") were those used as needed when the pool of regular drivers was exhausted, and casuals could not select the deliveries to which they were assigned. (TR 598, 600, 610, 700 - 701). Upon arrival from a delivery, a driver's time card would be posted after those which preceded him. (TR 601). After every other driver in the line of cards was called, in order, the driver would then be given another assignment. (TR 601). Casuals were required to be available for specific periods of time ("call blocks") unless their posted time card, which reflected when they were next available after their eight hour rest period, was removed from the board by notifying the dispatchers ("marked off"). (TR 598, 602). Mr. Chadwick stated that these drivers are to be always available, "as long as (they are) rested, unless marked off sick or (Mr. Chadwick) agreed to give (them) time off." (TR 707). Those who miss their call for an assignment were

moved to the bottom of the board, and a copy of their time card was forwarded to Mr. Chadwick. (TR 712, 714). If this happened on several occasions he would discuss the matter with the driver. (TR 716 - 717). It was possible to be rested on this "on call" schedule because there were slow periods and the driver would call the dispatchers to check his position on the board - that is, to see whether he would be driving anytime in the near future. (TR 710). The driver regulations (the seventy hours in eight days limitation) also helped the drivers to be ready for their calls. (TR 709).

Manipulation of the cards was easily discerned. (TR 602, 705). None of the drivers, including Complainants, ever complained to Mr. Chadwick about suspected card manipulation. (TR 603 - 604, 706 - 707). He was aware of occasional charges that some casuals were accorded preferential treatment by being given their choice of assignments, and upon learning this, he "dealt with the people involved." (TR 703). He later said he received such complaints only once. (TR 713).

The erratic ebb and flow of the freight delivery business results in unpredictable driver scheduling at times, and casual and extra-board drivers who did not expect to be called could be assigned work as a consequence. (TR 611 - 612). This labor pool permitted Respondent to meet unexpected demand peaks, thereby facilitating timely freight delivery, which is very important to Respondent's business, and which, if not observed, may result in profit loss. (TR 611 - 613, 725 - 729). Driver eligibility was monitored by reviewing his timecard and his driver logs, which were entered into a computer and compared. (TR 614). The logs were also compared with trip sheets on occasion, to detect driver manipulation of hours. (TR 614 - 615). Regular drivers who falsified record to exceed the ten hours per twenty-four hours limit, or the seventy hours per eight days limit, were given a warning letter. Casuals who did so were spoken to, but were not subject to discipline, other than refusal to hire, due to their non-employee status. (TR 615 - 616). Mr. Chadwick asserted that Respondent could refuse to hire casuals, since they were not protected by contract provisions regarding hiring. (TR 616 - 617). Assignments were distributed among the pool to lessen the work load on the casuals. (TR 643). Those casuals who were displaced when a terminal was closed could apply for work at one of Respondent's other terminals, as represented by RX 1. (TR 660 - 663, 700).

Additionally, Mr. Chadwick stated that fatigued drivers typically rest in their cab, then inform the dispatchers that they did so. (TR 627, 745 - 746). Such rests were understandable, stated Mr. Chadwick, since the company did not want its drivers to be fatigued. (TR 627). Medical care would be provided if a driver was sick, but a motel room would not be provided. (TR 744). If a driver informs the company that he is fatigued while on the third leg of a "double," then he may rest, although Respondent would not pay for a hotel room. A room is provided only when the driver has reached his destination and does not have time to return, or he runs out of hours to drive through no fault of his own. (TR 629, 745, 752). If a driver expends his hours en route, Respondent may send another to drive the freight to its destination. (TR 630). As long as the driver is not sick or ill in accordance with DOT regulations, he is eligible for dispatch until his hours expire, at which point he will be given rest in a hotel if he is driving. (TR 630).

Additionally, Mr. Chadwick testified that hiring for regular driver positions occurred when Respondent was informed by the Teamsters Union that the company exceeded a contract threshold of driving hours or tours by casuals, and that therefore more full-time, regular drivers were necessary. (TR 617 - 618, 700 - 701). According to Mr. Chadwick, seniority played no role in the full-time, regular selection process, and he never told Complainants otherwise. (TR 623 - 624, 693 - 694, 697). The primary considerations were recommendations from dispatchers and coordinators, union support for long-time drivers, employee performance while at Yellow, coworker compatibility, dependability and availability, and whether the candidate was laid off and wished to qualify for his/her pension or was laid off by another trucking company. (TR 624 - 626, 739 - 742). Older drivers were favored as well. (TR 637). "Whistleblowing" is not a factor. (TR 626 - 627). Not all casuals were considered for regular status. (TR 631). Moreover, casuals were not entitled to paid vacations, and did not have a right to exclude himself from assignment consideration (as regulars could do), although Mr. Chadwick tried to accommodate their vacation requests. (TR 632 - 633). Both regulars and casuals are subject to assignment ineligibility during investigation of a serious accident, such as a trailer overturn. (TR 633 - 634). If a regular is terminated after incurring a nonpreventable accident he may seek reinstatement in accordance with the union contract; casuals so discharged may not. (TR 634 - 635).

The three casuals selected to be regulars, complained of by Complainants, had extensive driving experience (two with other companies), and prior Teamster membership, although he did not know the details of the latter. (TR 636 - 637). Further, the dispatchers contributed their recommendations for the positions, and Mr. Somerson was not among them. (TR 722 - 723). Additionally, between Mr. Somerson's first work day for Respondent and his February 1995 Complaint several full-time drivers were hired, and between Mr. Buhnerkemper's start date as a casual in April 1993 and the date of his filing, in the Spring of 1996, eight full-time positions were available to casuals, and were filled. (TR 652 - 653). Mr. Buhnerkemper never expressed interest in a regular position, according to Mr. Chadwick. (TR 653).

Mr. Chadwick confirmed that the names which appear at RX 12 and 13 belong to Respondent's casual drivers at the Jacksonville terminal as of December 1996, and reflect the number of tours driven, weekly and for the month of December. (TR 664 - 665). None of the twenty-one drivers at RX 12 were selected for regular status in September 1996. (TR 668). The list at RX 12 was derived from the quarterly report at RX 13. (TR 669).

Moreover, Mr. Chadwick stated that he was not well-versed in the STAA, but was aware that a fatigued driver could not be forced to drive. (TR 659).

Roger Veith testified as well. (TR 1009). He is the owner of a truck repair business that performs work for Respondent and approximately seven other trucking companies, and has been a mechanic for twenty-seven years. (TR 1009, 1019, 1034, 1044). Mr. Veith was summoned by Respondent to repair Mr. Buhnerkemper's truck on February 5, 1997. (TR 1010 - 1013). On arrival Mr. Buhnerkemper indicated that the truck had an air leak. (TR 1014). No suspicion that the leak was caused by a deliberate cut was voiced by Mr. Buhnerkemper, Mr. Veith stated. (TR

1015 - 1016). The leak appeared to have been caused by normal wear and tear, and was appeared at a location on the hose where air leaks typically occur (specifically, three to four inches form the end of the air line, under the spring area). (TR 1015 - 1016, 1018, 1052). There was no indication of an emergency stop, which would have been necessary had the air line suddenly or severely ruptured. (TR 1016). Since the truck appeared to have been pulled off the road into a parking lot, Mr. Veith surmised that the leak had been gradual. (TR 1016). After the damaged portion of the line was replaced, it was discarded. (TR 1017).

According to Mr. Veith, an air hose could fail if cut half-way through. (TR 1025 - 1026). New air lines may also fail. (TR 1026). Moreover, if an air hose leak causes air pressure to fall below seventy pounds, the brakes will lock. (TR 1032 - 1033). If the compressor adequately compensates for an air leak, it may not be discernable on the pressure gauge in the tractor. (TR 1033 - 1034). Additionally, unlike a service air hose, the emergency air hose does not incur a pressure surge with brake use, and thus application of the brakes would not cause a partially cut emergency line to burst,. (TR 1037 - 1039). Theoretically it is possible for the brakes to automatically apply in the rear trailer and dolly only, if the air line was completely severed. (TR 1041 - 1043). Mr. Veith noted that such was not the case with Mr. Buhnerkemper's truck. (TR 1042 - 1043).

David W. Robinson, the certified truck and trailer mechanic for U.S. Fleet Service who performed the repairs on Mr. Somerson's truck on February 5, 1997, also appeared at the hearing. (TR 1054). U.S. Fleet Service is contracted to provide service to Respondent's trucks. (TR 1054 - 1055). Mr. Robinson has been a mechanic for thirteen years. (TR 1055). When Mr. Robinson arrived at approximately 3:00 a.m., he found the truck pulled over on the side of the road, and he parked directly behind the vehicle. (TR 1058, 1068, 1071 - 1072). Despite the dark lighting conditions (there were no street lights), he noted skid marks which were approximately five feet long trailing behind the truck. (TR 1058 - 1059, 1075). None of the tires were flat, according to Mr. Robinson, and no tire debris was present. (TR 1060, 1062). Mr. Somerson directed Mr. Robinson to the leak, which appeared to be "caught between two objects and pinched." (TR 1061, 1071). The breech was small, and would have caused a gradual leak, according to Mr. Robinson. He asserted that he was familiar with such defects because he saw them frequently in his line of work. (TR 1062, 1067). Mr. Somerson did not appear alarmed, and did not mention that he believed the line to have been cut, according to the witness. (TR 1063).

Mr. Robinson replaced the air line and later discarded it. (TR 1063, 1065). After the repair Mr. Somerson boarded his vehicle and left. (TR 1065). The mechanic drove behind the truck for approximately three miles and noted no abnormal handling or bumping. (TR 1066).

The letter at RX 30 was prepared by both the signatory (part-owner and shop foreman Donn Sellers) and Mr. Robinson, he stated. (TR 1057).

Respondent offered Worth Barbee, Respondent's Equipment Service Manager of sixteen years, as an expert witness. (TR 791 - 793). He oversees equipment maintenance and diagnostics

in Respondent's Atlanta, Georgia, Northern Florida and Eastern Alabama facilities, and he is stationed in Atlanta. (TR 792, 794). Additionally, he has been a mechanic or mechanic supervisor for twenty-six years, has been schooled in both mechanics and managing, is an instructor on brake repair and is highly familiar with the brake systems and pindle hooks used on Respondent's trucks. (TR 794 - 796).

Mr. Barbee narrated a videotape that depicted a routine pre-trip driver's inspection at the hearing. (TR 801 - 804). Such inspections are required by regulations, and are always performed, according to Mr. Worth. (TR 798, 804). He notes that the inspection of the underside of the air supply hose is not required; the driver need only examine the hoses visually. (TR 838). A videotape relating to the air flow path of a truck's brake lines was shown during his testimony as well. (TR 805).

The mechanic stated that the emergency air system in Respondent's trucks is a safety measure designed to provide pressurized air (one hundred twenty p.s.i.) which overcomes internal springs, thereby keeping the brakes from locking. (TR 805 - 808). A leak in the system causes loss of air pressure; if the lost air is not fully replaced by the air propelled by the air compressor, the brakes eventually lock. (TR 808). If the leak is large, this result swiftly occurs; if a brake line is cut in major fashion at the terminal, the leak would be heard and felt during the pre-trip inspection, and the truck would not move. (TR 808 - 811, 818). If the hose were only partially cut on its underside, then air pressure would not leak out until the truck was driven and the hose thereby subjected to normal wear and tear. (TR 838 - 839). Moreover, it is possible for the tractor to retain braking capacity while the trailers lose it (thereby causing only the trailer brakes to apply and then lock, depending on the speed of pressure loss), if air loss occurred in the emergency side air hose. (TR 840 - 842, 864 - 865).

Small leaks sometimes occur on the road because of normal wear and tear, and air line replacement occurs frequently. (TR 811, 867). If the compressor could not maintain adequate air pressure with such a leak, the driver would become aware of the leak because the brakes would be gradually applied, causing a "dragging effect," enabling the driver to pull over and notify the dispatch terminal. (TR 862 - 864). Catastrophic air pressure loss at sixty miles per hour would lock the brakes and cause the truck to slide. After sliding three hundred fifty feet, the tires would become flat by the severe wear, or become flat in one spot, causing a large bump that would render the vehicle uncontrollable. (TR 813, 850 - 851). If the pre-trip inspection is sub-standard, the driver may not notice a small leak; company-wide, discovery of such leaks by drivers, while driving, occurs weekly company-wide and once or twice per week in the Atlanta terminal. (TR 812, 845 - 847). Upon discovery, the driver calls Respondent, which notifies a vendor who repairs the leak. (TR 812). After the repairs, the driver continues on his tour. (TR 812).

Mr. Barbee opined that it was unlikely the air lines were deliberately partially cut, since the saboteur would not know when the line would completely fail. (TR 815 - 816, 861 - 862). According to Mr. Barbee, Respondent "ha[d] no means to cut an air line to a depth to, so that it would fail at a certain point in time." (TR 861). Tampering with the emergency brake system

would be an ineffective means of sabotage, because it causes the truck to stop. (TR 816). Moreover, Respondent would not want to place a driver, his freight and the public at risk by causing an accident. (TR 861).

Additionally, it is easy to discern a pindle hook left in the upright position, and it is simply to close a pindle hook, according to Mr. Barbee. (TR 814 - 815). An open pindle hook is the result of employee error, and to rectified it either the driver closes it, brings the truck to the maintenance shop, or informs the shop, which then dispatches a mechanic to address the problem. (TR 815). Pindle hook tampering would not be a very effective form of sabotage, since it is so easily detected during the mandatory pre-trip inspection. (TR 816). Further, had a supervisor tampered with Complainants' equipment, an hourly employee would quite likely have filed a grievance if he observed the act. (TR 817 - 818). In any event, the truck could have been pulled up to the driver's area with the pindle hook open after being attached to the trailers in another area; indeed, in one instance a company tractor pulled a trailer several miles before the driver noticed that the hook was unlatched, according to Mr. Barbee. (TR 852 - 853). He further stated that he did not know whether weather/road conditions and the six month interval between lubrication of pindle hooks could undermine the integrity of the hooks. (TR 854 - 857). Moreover, he had seen pindle hooks which failed after severe accidents, but not under normal driving conditions. (TR 858 - 859).

Documentary and Tape Recorded Evidence

The parties submitted the following documents and audio tapes for my consideration of this matter:

Mr. Somerson's Florida driving record, generated on March 30, 1998, appears in the record. (CX 1). It reflects that he was approved to drive double and triple trailers and hazardous and tank materials. He was issued tickets in 1985 and 1991, and in both cases adjudication was withheld. A February 18, 1997 letter to Mr. Somerson from Daniel L. Hornbeck, Esq., an attorney for Yellow Freight, states that the investigation into his air line breech showed it was caused by abrasion due to wear and tear. (CX 2). Mr. Hornbeck further asserted, *inter alia*, that Mr. Buhnerkemper's incident was "entirely distinct" from that of Mr. Somerson.

Several documents appear at CX 3, including a March 12, 1998 letter to the undersigned by Mr. Somerson conveying, *inter alia*, his dissatisfaction with the process of pursuing a complaint under the STAA; his hostile reception upon resuming driving assignments for Respondent in July 1995; that Respondent deliberately caused his accident in February 1996 and his ruptured air line of 1997; that Respondent retaliated against him through these measures and then by denying him assignments; and that Mr. Buhnerkemper was suspended for refusing an assignment. The accident report for the February 10, 1996 accident was included, and states that Mr. Somerson's trailer overturned near the end of an on-ramp, possibly because its load shifted. One of the tires left a long track as well. A June 11, 1996 letter to Mr. Somerson from Teri L. Graham, State Director for the Federal Highway Administration, conveyed that review of the

unspecified information at her disposal showed the trailer "could have been not properly loaded which resulted in the over-turn." The evidence was conflicting, however, and Mr. Somerson was directed to the local police department if he wished to pursue his belief that the load was intentionally loaded improperly to cause him harm. A letter dated February 11, 1997 from the Department addressing Mr. Somerson's investigation complaints was also submitted. Additionally, an incident report for the "pindle hook" incident was submitted.

CX 4 consisted of documents and a cassette tape received by this Office on March 31, 1998. Included were copies of wage statements and income records for Mr. Somerson and Mr. Buhnerkemper; documents and a letter related to the pindle hook incident of February 16, 1997, including the aforementioned incident report; and letters and driver's logs which, on their face, appear to relate to Mr. Somerson's alleged February 5, 1997 severed brake line incident. Copies of Mr. Buhnerkemper's driver logs dated from April 15 to April 18, 1996, and April 24 and 25, 1996, were submitted as well, as were letters pertaining to the flooding complaints for the Jacksonville terminal. Additionally, correspondence concerning Mr. Somerson's February 10, 1996 accident, and the accident report for same, appear at CX 4, as does Mr. Buhnerkemper's employment application for the Yellow Freight position, dated March 3, 1993, accompanied by a request for paperwork updates by Respondent human resources department dated October 10, 1995. Further, information related to Complainants' assertions the Yellow engaged its drivers in illegal "runs" were submitted here as well, as were Mr. Somerson's telephone transcripts for the below conversations and the Edens tape recording.

A recording of conversations (and a transcript, typed by Mr. Somerson) between Complainants and Gary Dempsey, Jack Wade and Mr. Bagwell was also provided and played at the hearing. (TR 139 - 163, 366, CX 4). According to Mr. Somerson, each conversation was represented in full, and each participant was informed that he was being recorded, although he did not directly answer when asked whether he recorded their being so told. (TR 370). (TR 367 - 368). Initially, Mr. Buhnerkemper's call with Mr. Dempsey was played. (TR 145). Mr. Somerson informed Mr. Dempsy that he was asked to perform a ten and a half hour drive in contravention of federal regulations. (TR 146). When Mr. Somerson remarked that he had not yet been told whether he would be hired for the job or whether he would be "let go", Mr. Dempsey conveyed that Mr. Buhnerkemper, as a casual, was not an employee, and therefore he could not be terminated. Decisions to use casuals were handled elsewhere, according to Mr. Dempsey. (TR 147 - 148). He further stated that "if we don't want to use you, for whatever reason, that's our choice whether or not - that's why you're a casual laborer. We don't - we're not bound by any rules or restrictions on a casual." (TR 148).

In the second call, John Olover informed Mr. Buhnerkemper that a decision had not yet been made on whether he would receive the assignment. (TR 149 - 150). In the third taped conversation, Mr. Olover told Mr. Somerson that he would be placed on the board again, and would thus be eligible to work. (TR 150 - 151). In the fourth call, Jack Wade was informed by Mr. Somerson that the Sheriff's office advised him not to work until he spoke to the state attorney's office. (TR 151). Mr. Wade stated that Mr. Somerson had quit his job by refusing to

depart with the trailer, and he could resume work by filling out a new time card. (TR 152). Mr. Somerson contended he did not refuse to work, but rather, was ordered to leave the property. (TR 152).

Another recorded conversation was purportedly between Mr. Somerson and Charles Chadwick, and took place on February 16 or 17, 1997. (TR 153 - 158, 754). They discussed the incidents of February 16. Mr. Somerson characterized the incident as sabotage and did not recall having been told to drive the truck to the shop; Mr. Chadwick stated human error was the cause, that the purpose of a pre-trip inspection was to detect such errors, and that he told Mr. Somerson to drive the truck to the shop so the problem could be corrected. Mr. Chadwick told Mr. Somerson to present a note indicating when he could return to work. (TR 156 - 157). When asked about the coincidence of Mr. Buhnerkemper and Mr. Somerson's brake failure, Mr. Chadwick replied, "that's news to me," and he explained at the hearing that he meant that Mr. Buhnerkemper's brake line failure was not previously known to him. (TR 756, 759). According to Mr. Chadwick, Mr. Somerson did not convey that this conversation was being recorded. (TR 754).

An additional recorded conversation was between Mr. Somerson and Kenneth Bagwell, according to Mr. Somerson. (TR 158, CX 4). Through frequent interruptions Mr. Bagwell conveyed that several casual drivers were considered for regular positions, and that he could discuss the matter at a less hectic time. He also stated that regular employee status confers a "more controlled situation," due to union membership, and because seniority becomes a factor. (TR 161). A further thought on fatigue was not completed. (TR 162).

An audiotape of Mr. Somerson's April 4, 1998 telephone conversation with Steve Edens was submitted and played at the hearing. (TR 126 - 137, CX 5). Mr. Edens is a driver for Respondent, and the tape revealed his assertions that he has been disciplined for "fatiguing off," i.e., not driving due to fatigue. (TR 131 - 132). He stated that Respondent had a company-wide policy of encouraging drivers to drive despite fatigue. (TR 134). This result may not be intended, he stated, and Respondent was essentially a good company, but safety was compromised nonetheless. (TR 134 - 135, 137).

A tape recording of a March 6, 1995 conversation between Mr. Somerson and Jim Berg, Respondent's dispatcher, was played at the hearing and submitted, along with a transcript drafted by Respondent. (TR 950, RX 17a, 17). Therein Mr. Somerson was heard to decline an assignment because he did not "have any wheels" and believed he was not within a calling period. (TR 950 - 951). Mr. Berg conveyed that Mr. Somerson remained on the board during and after the call block time, and although he need not be available to answer his phone after the call block time, if he does he is deemed eligible for assignment. (TR 955 - 956). Further, Mr. Berg stated that if difficulties arise, Mr. Somerson is obliged to call to remove himself from the board. (TR 950 - 951). Mr. Somerson denied he knew he could be called outside of a call block. (TR 954, 965). At the hearing Mr. Somerson argued that the tape had been edited, and that an exchange about his fatigue took place during the call as well. (TR 957). Respondent denied it edited the tape. (TR 959 - 960). Mr. Somerson submitted a copy of a document entitled "Affidavit" and

dated May 15, 1995, which represented that Gary J. DiPillo witnessed Mr. Somerson's side of the March 6, 1995 conversation, and that Mr. Somerson appeared "extremely fatigued" at the time he was called by the dispatcher because he had been "up all day working on his car at the Toyota dealership . . ."

A purported transcript of a conversation between Mr. Edens and Jim Berg also appears in the record. (CX 5). It consists of Mr. Berg summoning Mr. Edens to work, which Mr. Edens declined due to fatigue.

A notice of full-time employment opportunities dated March 19, 1997 appears at RX 1, with Mr. Chadwick's name at the bottom. Mr. Somerson's employment application, dated April 7, 1993, which depicted his prior work history, was also submitted, as was a March 14, 1995 letter informing Mr. Somerson that he would not be used as a casual driver due to unavailability. (RX 2, 3). RX 4 and 5 contains copies of letters addressed to Yellow Freight purportedly from Mr. Somerson, which address his rollover accident of February 10, 1996 and his complaint regarding being "passed over" for regular driver hiring. RX 7 contains the police incident report for the February 16, 1997 altercation at Yellow Freight over the upright pindle hook assembly, and at RX 8 appears a copy of Mr. Buhnerkemper's employment application dated March 3, 1993 and setting forth his prior employment history. Confirmation of Mr. Buhnerkemper's receipt of the applicable driving regulations was also submitted. (RX 10).

A list of the Yellow Freight seniority roster, revised on November 14, 1996, appeared at RX 11, and Respondent's casual driver roster for the fourth quarter of 1996, which contained twenty-one names, was also presented, as was a log depicting their tours during that period. (RX 12, 13). The breakdown reports for the February 5, 1997 brake line incidents also appear in the record. (RX 14). Moreover, a notice entitled "Over-the-Road Operations Procedures, Jacksonville, Florida" was submitted. (RX 16, TR 875). It set forth fourteen policies which applied to drivers, and reflected signatures by members of Respondent's management personnel, including Mr. Olover, and Teamsters Local Union 512 representatives. Respondent also submitted a purported transcript of the March 3, 1995 conversation between Mr. Berg and Mr. Somerson. (RX 17).

Photographs of the brake line configuration and pindle hook assembly of a Yellow Freight truck were also presented. (RX 6, 9a, 9b). Additionally, a copy of *Federal Motor Carrier Safety Regulations*, Parts 383, 398 - 397, 399, which applies to all common carriers, appears in the record. (RX 15, TR 866). Further, notes relating to an altercation between Mr. Somerson and Mr. Huntsinger, dated September 19, 1995, were submitted. (RX 22).

An undated letter from James R. Collins to Mr. Olover appears in the record as well. It relates Mr. Collins' concerns regarding his safety, equipment sabotage, threats and conflict with fellow workers, and requests that Respondent protect him. The letter casts the impression that Mr. Somerson caused these concerns. (RX 21). A note by an unspecified Human Resources Manager, setting forth the results of his inquiry into Mr. Somerson, was attached. (RX 21).

Additionally, Mr. Olover's letter dated September 19, 1995 addressed to Mr. Somerson and setting forth the assignment procedure in response to Mr. Somerson's submission of a time card which predicted fatigue and removed him from assignment eligibility was in the record. (RX 23). Further, the employment applications for Messrs. Wilson, Kennedy and Kelly, dated September 13, 1996, November 3, 1995 and October 27, 1995 were presented. (RX 24 - 26). A summary of their work histories, as well as those of Complainants, appears at RX 27. The opinions of Mr. Veith and Sellers conveying that the February 5, 1997 brake line ruptures resulted from normal wear and tear, and Mr. Veith's bill for services rendered, were submitted as well. (RX 28 - 30).

Respondent also presented a copy of the file of Dennis D. Russell, an OSHA investigator, regarding Complainants' allegations. Mr. Somerson's statement was dated February 24, 1997, and depicts his belief that he was not hired as a regular driver because of his "past protected activity." Mr. Russell also posed questions to Mr. Bagwell, and his responses convey that dispatchers individually recommended casual drivers for regular driving positions, and that Complainants were not chosen for the positions because they "made it very clear for several years that they were not interested in full time employment." Yellow Freight's response to Complainants' complaints, dated December 9, 1996, were included in Mr. Russell's investigation file as well.

III. Findings of Fact and Conclusions of Law

The extensive evidence presented often pertained to matters not germane to this proceeding, given the complaints filed with the Occupational Safety and Health Administration of the Department of Labor (OSHA). *See Discrimination Case Activity Worksheet, October 9, 1996; Complainant Somerson's OSHA Statement, February 24, 1997; Yellow Freight Systems v. Somerson and Yellow Freight Systems Inc. v. Buhnerkemper, Secretary's Findings, January 20, 1998*. Therein, Complainant Somerson alleged that he was not hired as a regular driver, his brake line was severed, and he was denied a transfer to another terminal because of his prior STAA complaint filings. Complainant Buhnerkemper complained that he, too, was denied a regular driver position because of his prior STAA filing. Therefore, although the summary of the evidence was substantial in order to be comprehensive, I look to it in pertinent part only, bearing in mind the specific allegations raised by Complainants in their filing.

Based on the testimonial, documentary and recorded evidence presented in this matter, it is clear that Complainant Somerson was a casual driver for Respondent for approximately three and a half years, and had eight and a half years of total truck driving experience. (RX 27, 2, TR 38 - 44). The on-call nature of his position caused him to be fatigued at times, requiring him to refuse assignments when called by the dispatchers. When he worked under Linehaul Manager Chadwick (which supervision ceased in January 1995) Mr. Somerson had a special arrangement permitting him to work a set period (Thursdays through Sundays) and requiring him to be completely available, in accordance with applicable regulations, during that time. Upon Mr. Olover's arrival in January 1995, Mr. Somerson was no longer afforded this schedule, as all casual

drivers were required to be constantly on-call and available, within the parameters of the regulation-required rest period. If he was unable to drive due to fatigue, he was to call the dispatcher to inform Yellow Freight; otherwise, the company assumed he was available, and relied upon this assumption accordingly in its assignment process. In the Spring of 1995 he filed a complaint because he was discharged due to unavailability; the matter was eventually settled. Complainant noted hostility from the dispatchers on his return.

In February 1996 his truck overturned, and he was eventually found not at fault for the incident. This may have happened because the truck was overloaded. Relations again were strained on his return after his hospital stay. On October 9, 1996 Mr. Somerson filed a complaint with OSHA alleging he was not hired as a regular driver in September 1996 due to his prior STAA filing. Then, on February 5, 1997, Complainant Somerson's brake line leaked during a trip, requiring repairs. Although he suspected the company sliced his line, he did not immediately inform the company of his suspicions. On February 16, 1997 he tried to pick up his truck for a trip and found the pindle hook assembly was unsecured. Mr. Somerson informed Mr. Chadwick, who informed him to drive the truck to the company repair shop. He refused to do so, because he suspected other defects lurked within the machine. After complaining to a policeman, Mr. Somerson left the work site. Complainant subsequently amended his STAA complaint to incorporate these alleged acts of whistleblower discrimination. In April 1997 Respondent's terminal closed and Complainant sought work elsewhere.

As for Mr. Buhnerkemper, at some point after April 1996 it is apparent that he complained to OSHA after he perceived Respondent requested him to drive over the permissible hours of service. After he initially filed the complaint, he was not called for assignments for approximately ten days, and he detected a degree of disparate treatment by the dispatchers. He subsequently withdrew the complaint. After he was not hired for the full time regular driving position in September 1996, he filed a complaint with OSHA on October 9, 1996.

I find that Complainants have, in part, satisfied their *prima facie* cases. Respondent stipulated that Complainants engaged in protected activity pursuant to the 42 U.S.C. §5851. (TR 587). Moreover, Respondent stipulated that it was aware of Complainants' protected activity as well. (TR 587). Based on Respondent's stipulations and the record, I so find.

It must next be determined whether Respondent effected an adverse employment act upon Complainants. Complainants complained of five adverse acts at Respondent's hands before the Secretary. Mr. Somerson complained of two instances of vehicle sabotage, failure to be promoted to regular status in September 1996, and failure to be transferred to a preferred terminal. (*See Secretary's Findings* of January 1, 1998 and *Discrimination Case Activity Worksheet* of October 9, 1996). Mr. Buhnerkemper complained that he, too, was wrongly barred from regular status in the September 1996 hiring process. *Id.*

The record does not establish that Complainants' vehicles were sabotaged by Respondent, or at its behest. Mr. Somerson's testimony was the sole evidence which indicated that

Respondent caused his accident of February 10, 1996. There is no apparent basis for his conclusion, other than mere suspicion. Although he conveyed that his opinion was formed in part by the statements of the accident investigator, her report made no mention that she found evidence of, or suspected, foul play. Indeed, she did not even conclude that his trailer was overloaded, improperly or otherwise. (CX 3). Mr. Somerson's testimony did not cast doubt on her report, nor did the accident report. (CX 3). Further, his assertion that the guard observed an unusually fast investigation in this case does little to raise an inference of culpable behavior by Respondent. Additionally, no evidence by any authority of a finding of criminal or intentional activity was presented.

Likewise, Mr. Somerson's brake line incident on February 5, 1997 was not shown to have been caused by Respondent. The mechanic who repaired the air leak, Mr. Robinson, credibly testified that it was the result of pinching, a common occurrence. (TR 1061, 1071, RX 30). Moreover, he further credibly stated that the breech appeared not to have been sliced, and was small; any resultant leak would have been gradual. While his observation that the truck did not have long skid marks or directly seen tire damage was not conclusive due to the poor lighting conditions, the absence of apparent tire damage as discerned by his observation of the truck's operation further supports Respondent's position. Mr. Somerson did not contradict the latter assertion. On the whole, Mr. Somerson offered no reason to doubt the credibility of Mr. Robinson during the course of the proceeding. Moreover, Respondent's expert witness was persuasive in this regard. Mr. Barbee convincingly conveyed that cutting a brake line would be an unlikely method of sabotage because its results would be unpredictable, i.e., it could injure a driver other than the one intended. (TR 815 - 816, 861 - 862). Mr. Somerson did not counter this testimony. As he frequently noted throughout the hearing, he is not a mechanic, and he gave no reason to accept his opinion as to the cause of the air hose leak over those offered by the expert witness mechanic and the mechanic who observed the leak and repaired it. The record reveals no indication that Mr. Somerson would recognize the difference between a partially cut air hose and one which was ruptured due to wear and tear. No expert witness was offered by Mr. Somerson in this regard, nor was evidence of a finding by any authority that the incident was intentionally caused presented. Thus, the record fails to support Mr. Somerson's contention that he suffered an adverse employment act by Respondent's hand on February 5, 1997.

Mr. Buhnerkemper's air line incident of February 5, 1997 was not a part of his complaint to the Secretary. Even had he amended his complaint to include the occurrence, Mr. Buhnerkemper's accident would not have been proven to have been caused by Respondent's foul play either. As with Mr. Somerson's February 5, 1997 incident assessed above, the testimony of Respondent's expert witness was persuasive in this regard, for the aforementioned reasons. Moreover, the mechanic who mended the defect within hours of its occurrence stated that it was the result of normal wear and tear, in light of its appearance and location. (TR 1015 - 1016, RX 28). That Mr. Buhnerkemper did not need to make an emergency stop, but rather, was able to pull over into a parking lot, further supports the mechanic's conclusion in this matter. (TR 1016). Mr. Buhnerkemper offered no reason to accept his opinion that the line was cut over that of the experienced mechanic, and also offered no expert testimony in this regard. As with the above

incidents, there is no indication in the record authored by an investigating authority that this incident was found to have been criminally caused. He also failed to promptly voice his allegedly immediate suspicion that the line appeared intentionally sliced. Upon assessing his testimony, it is apparent that he had little more than a suspicion that his slow air leak was cut by Respondent, which is clearly insufficient to prove that he suffered an adverse act caused by Respondent in this instance.

The evidence supports a finding that the "pindle hook" incident of February 16, 1997 was, in the broadest sense, an adverse employment act caused by Respondent. The record shows that the hook was indeed left in an upright, rather than locked down, position. Mr. Somerson so testified, and none of Respondent's witnesses countered that assertion, other than through their own conjectures. In light of Mr. Somerson's testimony and the undisputed situs of the unlatched assembly, it is clear that Respondent's employees were responsible for ensuring that it was safely and properly secured. Thus, Mr. Somerson was subjected to an adverse act caused by Respondent in this regard.

Additionally, Respondent's decision not to hire Complainants as full-time, regular drivers constitutes an adverse act pursuant to the STAA. The parties do not dispute that Complainants worked as casual drivers for Respondent during the period that it considered which, if any, casuals should be hired as regulars. Given the advantages of achieving regular driver status, credibly described by Complainants and by Respondent's employees, *supra*, it is apparent that, by not being so hired, Complainants suffered an adverse act as surely as if they had been denied a promotion. Respondent does not dispute that it was the party who so refused to hire Complainants. Thus, Complainants were subjected to an adverse employment act thereby.

Mr. Somerson clarified the nature of his failure-to-transfer complaint at the hearing. (TR 186 - 190). He stated that his complaint in that respect was predicated upon his denial of a regular-driver position. Since he was not hired, he argued, he was denied the ability to use seniority to transfer to a terminal of his choice when the Jacksonville Terminal was closed. (TR 190). It is clear, therefore, that Respondent did not "deny him a transfer" (indeed, he chose not to seek casual driver work for Respondent in another city, despite notices that such positions were available); rather, Complainant Somerson is simply alleging a harm that resulted from Respondent's hiring of other candidates for the regular-driver position. As such, no separate adverse employment act was effected upon Mr. Somerson as regards his "failure to transfer" complaint.

It must next be determined whether the aforementioned adverse acts were caused by Complainants' protected activity. In determining this issue, I must assess whether Complainants presented evidence sufficient to raise the inference that the adverse action occurred as a result of their protected activity. *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Dec. 15, 1992), slip op. at 2. Circumstantial evidence may suffice to show this causal link. *Clay v. Castle Coal & Oil Co., Inc.*, 90-STA-37 (Sec'y Nov. 12, 1991). Where protected activity and an adverse action occur within a close period of time, that coincidence constitutes solid evidence of causation, an

inference of a retaliatory motive is justified, and a *prima facie* case of retaliatory discharge is established. *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Zinn v. University of Missouri*, 93-ERA-34 at 36 (Sec'y Jan. 18, 1996). However, where wholly unprotected conduct occurs immediately prior to the adverse employment action, an inference that the adverse act was not caused by the protected activity may be made. *Etchason v. Carry Companies of Illinois, Inc.*, 92-STA-12 (Sec'y Mar. 20, 1995) (*citing Monteer v. Milky Way Transp. Co., Inc.*, 90-STA-9 (Sec'y July 31, 1990), slip op. at 4). Respondent's proffered reasons for undertaking the adverse actions are not relevant at this stage of consideration. *Auman v. Inter Coastal Trucking*, 91-STA-32 (Sec'y July 24, 1992).

Only the proximity between Mr. Somerson's receipt of a truck with a raised pindle hook assembly and his protected activity supports his contention that it was motivated by his activity. No other evidence supports this inference. Mr. Somerson's testimony essentially conveyed that he was suspicious in light of Mr. Wade's ten-minute absence, and because of his past experience with the company. Neither point to Respondent's willingness to intentionally inflict bodily harm upon Mr. Somerson because of his prior activities. Mr. Somerson was not aware of the dispatcher's whereabouts, and there is no presumption in whistleblower law which dictates a finding of causation based upon a perceived prior poor employment relationship in this manner. It is thus apparent that Mr. Somerson's bases for alleging foul play are speculative in nature. However, the incident occurred sufficiently close in time to Mr. Somerson's protected activity. The ongoing nature of his complaints regarding driver fatigue, and his declination to drive as a result, is apparent from his testimony. Respondent did not dispute this, and indeed, produced witness testimony to corroborate this contention through Messrs. Chadwick and Olover, as seen above. Thus, the proximity between Mr. Somerson's objections to driver fatigue and the receipt of a truck with a raised pindle hook assembly is sufficient to raise the inference of retaliation in this instance. *See Willy v. The Coastal Corp.*, 85-CAA-1 (Sec'y June 1, 1994) (six month period between protected activity and adverse action sufficient to raise inference of causation); *Thompson v. Tennessee Valley Authority*, 89-ERA-14 (Sec'y July 19, 1993) (two week period).

Additionally, sufficient evidence was presented to raise the inference that Respondent's decision not to hire Complainants as full-time, regular drivers was motivated by their protected activity. As above, the hiring in September 1996 occurred in sufficiently close proximity to Mr. Somerson's repeated concerns as to his driving while fatigued, in light of their ongoing nature. Further, he testified that he objected to the "new" driver policy, applicable toward all drivers, implemented by Mr. Olover in January 1995, and his complaints were corroborated by Mr. Olover's testimony, as seen above. Mr. Buhnerkemper's testimony as to his April 1996 refusal to drive and his resultant OSHA complaint was not countered by Respondent. (TR 443 - 447). Since that preceded Respondent's decision to hire others for the regular positions by approximately six months, that proximity, too, suffices to raise an inference that Respondent's adverse action was motivated by Complainant Buhnerkemper's protected activity. *Couty, supra*. Additionally, their testimony that they were informed that seniority was the sole criteria is adequate to raise the inference as well. Given this portion of their testimony, and the parties' agreement that neither was hired as a regular, I find that Messrs. Somerson and Buhnerkemper

succeeded in raising the inference that they were not hired as regulars because of their protected activities.

The inquiry does not end there, however, for the ultimate burden of establishing, by a preponderance of the evidence, that retaliation was a motivating factor in the adverse action remains with Complainants. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996). Employer is next afforded the opportunity to rebut the inference of discriminatory motive by producing evidence of a legitimate, nondiscriminatory reason for the adverse action. *Zinn, supra* at 4. Respondent's burden in this regard is one of production, not persuasion; that is, Respondent need only produce evidence of such a rationale to satisfy its burden, and need not convince the trier of its verity. *Bausemer v. TU Electric*, 91-ERA-20 (Sec'y Oct. 31, 1995), citing *Kahn v. United States Secretary of Labor*, 64 F.3d 271, 278 (7th Cir. 1995).

Respondent satisfied its burden in this regard. The testimony of Messrs. Chadwick and Barbee support Respondent's position that if indeed the pindle hook was open when Mr. Somerson received the truck, it was the result of employee error. Their bases included their experience (Mr. Chadwick stated that such assemblies had been left in the upright position previously) and knowledge of driving procedure (the pre-trip inspection is required, and would have revealed the easily-discerned open assembly position, thereby making it an unlikely form of sabotage). (TR 654, 814 - 815). Respondent had thereby produced evidence of a legitimate, nondiscriminatory reason for the adverse action, namely, employee error. I note that although Respondent contends that Mr. Somerson may have opened the device, no evidence in the record supports this speculation.

Respondent has also satisfied its burden with respect to the regular driver selection. It articulates that Complainants were not selected because they were not desirable regular employees, but because those who were selected were superior candidates. In support of this, the testimony of Mr. Olover and RX 23 conveyed his sentiment that Mr. Somerson was involved in accidents (albeit non-preventable), had a workplace altercation with a dispatcher, and was improperly predictive about his fatigue. (TR 919 - 920, 924 - 929). He further characterized Mr. Somerson as a disruptive and antisocial worker, a contention corroborated by the letter by Mr. Collins. (TR 1002 - 1003, RX 21). Respondent asserts Mr. Somerson's prior employment history was "very spotty" as well. *Respondent's Brief* at 12. Further, Mr. Buhnerkemper expressed disinterest in working as a full-time driver and his prior driving experience was lacking, according to Respondent. *Id.* at 13. With these proofs, Respondent has satisfied its evidentiary burden, and has adequately articulated legitimate, nondiscriminatory reasons for its adverse actions.

At this point it is incumbent upon Complainants to show that Respondent's proffered reasons are mere pretexts for the actual motive, i.e., to discriminate against Complainants because they undertook protected activity. *Zinn, supra*; *Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34 (Sec'y Oct. 23, 1995). This is so because the burden of showing that the employer's adverse action was discriminatory rests at all times with the complainants. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). They may show the reason to be pretextual by showing

that an unlawful reason was more likely the cause of the discharge, or that the proffered explanation is unworthy of credence. *St. Mary's, supra*; *Nichols v. Bechtel Construction, Inc.*, 87-ERA-44 (Sec'y Oct. 26, 1992), slip op. at 13.

No such showing was made regarding the pindle hook incident. No evidence was presented which established that Respondent undertook an effort to cause Mr. Somerson bodily harm by leaving the assembly in the "up" position. Rather, all he offered as evidence was his testimony conveying that the hook was unlatched, and his suspicion that Respondent was behind it. This is insufficient to effectively cast Respondent's position as pretextual. I note that no showing has been made that Mr. Somerson caused the assembly to be raised, either.

Nor have Complainants established that Yellow Freight's proffered reasons for failing to hire Complainants as regular drivers were pretexts for discrimination. The gravamen of Mr. Somerson's argument in this respect is that the casual driving position was inherently at odds at times with one's natural sleep cycles, and therefore instances of fatigue were inevitable. He contends that he refused to drive at times as a result, pursuant to 49 C.F.R. §392.3. From his presentation at the hearing I gather that he asserts that Respondent believed him to be unfit for regular status in light of his instances of fatigue, and therefore did not hire him. In support of this, Mr. Somerson contends that he was informed by Respondent's employees, including Mr. Chadwick, that seniority at Yellow Freight was the chief criteria Respondent's hiring process. Since Complainants have more seniority than those hired, he contends, Respondent's assertions of other criteria are a mere subterfuge for their real motive - to discriminate against those who "blow the whistle" on Respondent's illicit activities.

This argument fails in several respects. Initially, I find that Respondent indeed weighed several factors in its hiring decisions. Although Complainants asserted that seniority was the sole criterion, I accord considerable weight to Mr. Olover's testimony on this issue, since he was the manager who actually made the hiring decision contested, and he conveyed much greater familiarity with Respondent's hiring practices than Complainants. He credibly testified that Respondent did not use seniority in the process, beyond requiring some time with the company in order to "look over" the prospective employee. (TR 931). Mr. Chadwick corroborated this assertion. (TR 624). The recorded conversation between Mr. Somerson and Mr. Bagwell is relevant here as well; the latter conveyed that one advantage of being hired as a regular driver is that seniority then becomes a factor, which implies that the converse is true if one is a casual driver. (TR 161, CX 4). Neither Complainant asserted that he was informed by Mr. Olover that seniority was the sole factor, or indeed, any factor at all. At times, Mr. Somerson's testimony ambivalently conveyed that union membership was considered, and so he was aware that at least one other criterion was relevant to the decision. (TR 177). Further, he stated that "dispatchers played a key role in whether or not you were to be made regular." (TR 177). From this it is reasonable to infer that he was aware that at least some discretion on the dispatchers' part was also at play in the process. Seniority, then, was not the sole criterion for achieving regular driver status. Moreover, aside from Complainants' contentions that Mr. Chadwick told them otherwise,

nothing in the record suggests that they were privy to the inner workings of Yellow Freight's hiring system.

Mr. Olover's asserted criteria requires particular attention, since it was he who declined to select Complainants, and chose Messrs. Wilson, Kennedy and Kelly instead. (TR 939). Mr. Olover's testimony conveys that he considered dispatcher recommendations, union referrals, co-worker compatibility, age, and their employee files (especially their driving histories). Mr. Chadwick's testimony corroborated that of Mr. Olover in this regard. (TR 624 - 626, 739 - 742). In light of the above, I find nothing probative in the record to establish that these criteria were not used to select these drivers. Mr. Olover's testimony reflects uncontestedly that the dispatchers did not forward either driver's name for Mr. Olover's consideration. Moreover, each of those hired had approximately twenty-five, thirty-four and thirteen years of total professional driving experience, respectively, as compared to Mr. Somerson's total of eight and a half years and Mr. Buhnerkemper's eleven and one quarter years of such experience. (RX 2, 8, 24 - 27). Mr. Wilson and Mr. Kennedy were each referred by the Teamsters Union, a criterion which was admitted by Mr. Somerson and an assertion which was uncontested by Complainants. (TR 944 - 946). Further, Mr. Olover attested in uncontroverted fashion that Mr. Kelly was recommended by the dispatchers of Yellow Freight, and that he was older than either complainant. (TR 946 - 947, RX 26). Additionally, Mr. Somerson's working relationship with Yellow employees did not appear positive, as demonstrated by his altercations with Mr. Huntsinger and Mr. Collins. (RX 21, 22).

The record also clearly shows that Mr. Olover considered Mr. Somerson to have been unfit for regular driving duty because of poor availability due to fatigue, doctors appointments and car problems. (TR 994). It is established that discipline for occasional absences due to driver fatigue caused by inability to sleep may constitute sufficient evidence of discriminatory animus for STAA purposes. *Ass't Sec'y & Self v. Carolina Freight Carriers Corp.*, 91-STA-25 (Sec'y Aug. 6, 1992). Further, a respondent's attempt to cast such discipline as being intended to promote advance dispatcher notice of a driver's unavailability due to fatigue, rather than for the fatigue itself, does not dispel a finding of illegal motive; otherwise, such a "facially neutral policy . . . would permit the employer to accomplish what the law prohibits." *Id.* at 5.

However, Mr. Olover persuasively presented testimony that while Mr. Somerson's driving record and skills were not lacking (which, indeed, is supported by CX 1), he had a *consistent pattern* of poor attendance. (TR 991, 993). Mr. Somerson did not contest this characterization. (TR 991 - 995). Rather, he merely asserted that his absences were due to fatigue; indeed, he agreed that he had "a history with the company of being fatigued when called." (TR 47 - 48, 284 - 285, 301 - 302, 994). Throughout the hearing, he maintained the position that the casual driving position was inherently at odds with natural sleep patterns in general, and with his sleep patterns in particular. (TR 47 - 48, 302, 943, 960, 994). Thus, his situation is distinct from that of the complainant in *Self, supra*, in which occasional lapses from company policy were not sufficient to warrant reprimand. *Brandt v. United Parcel Service* is relevant here. 95-STA-26 (Sec'y Oct. 26, 1995). There, as here, the complainant "refused the assignment because, as a result of changing his sleep pattern, he would be too fatigued to safely make the trip," and the complainant

"presented several studies which conclude that most people cannot change their sleep patterns and simultaneously avoid fatigue." *Id.* at 3. Although that case dealt with whether the driver engaged in protected activity, the Secretary conveyed that the complainant was dismissed for "refusing to even attempt to change his sleeping pattern," rather than for his undertaking of protected activity. *Id.* at 3. Therefore, the nature of the position was not inherently at odds with the STAA; rather, the driver's refusal or inability to accommodate his job caused his adverse circumstances. *See e.g.* TR 302.

On these facts and Mr. Somerson's argument, then, it is apparent that a similar motive was present in Respondent's hiring process. Thus, it is apparent that driver fatigue contributed to Mr. Somerson's failure to be hired as a regular driver insofar as he had a pattern of being absent when called due to fatigue, which he attributes to the very nature of the job. In that sense, he is in essence asserting that implementation of the casual driver position constitutes a veritable *per se* violation of the STAA, a finding not previously made by the Secretary and unsupported by case law. The relationship between Mr. Somerson's fatigue and his failure to achieve regular driver status does not reflect the presence of a motive to discriminate on Respondent's part in this instance. Therefore, for the aforementioned reasons, Mr. Somerson has not shown Respondent's legitimate, nondiscriminatory reasons for failing to hire him as a regular driver to have been pretexts for discriminatory motives.

Nor did Mr. Buhnerkemper show the aforementioned reasons to have been pretextual. I note that there is little in the record that could be interpreted as addressing this point on behalf of Mr. Buhnerkemper. Although he claimed that he was told by Mr. Chadwick that seniority was the criterion for regular-driver selection, Mr. Chadwick credibly denied having so informed him with a candor and certainty which I found more persuasive. (TR 455, 693 - 694). Mr. Buhnerkemper's testimony did not convey familiarity with the hiring at Yellow Freight and, indeed, he admitted that he was unaware as to whether those hired were senior to him. Thus, his position in this matter appears to have been based upon no small measure of conjecture on his part. Indeed, he did not address those criteria which Respondent proffered as it reasons for failing to hire Mr. Buhnerkemper. Rather, the record supports Respondent's contention that he had less driving experience then those candidates that were selected. On the whole, then, Mr. Buhnerkemper did not show Respondent's position to be pretextual.

IV. CONCLUSION

Complainants have failed to establish that Respondent was motivated by unlawful animus in handling their trucking equipment or selecting other candidates for its full time, regular driving positions. Rather, Respondent has come forward with credible and more persuasive evidence that these activities were the result of legitimate, non-discriminatory reasons unrelated to Complainants' protected activities. Consequently, I find that Complainants have failed to establish that Respondent violated the Act.

In light of the foregoing, and since no attorney represented either Complainant, Respondent is not responsible for attorney's fees in this matter (although there was some reference to furtive consultation with an attorney).

RECOMMENDED ORDER

For the foregoing reasons I recommend that Complainants Daniel S. Somerson's and Gary C. Buhnerkemper's requests for relief pursuant to the STAA be denied and that their claims be dismissed.

Ainsworth H. Brown
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received within ten business days of the date of this recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).